(1) Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

ROY RICHARD DITTMAN,

Petitioner,

v.

STATE OF CALIFORNIA STATE AND CONSUMER AFFAIRS AGENCY, MEDICAL BOARD OF CALIFORNIA, ACUPUNCTURE COMMITTEE, and MARILYN NIELSEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to determine whether section 7(a)(1) of the Privacy Act of 1974, which secures to individuals the right to not disclose their social security numbers (SSN) to state agencies, is enforceable in federal court? And if so, does a state law requiring SSN disclosure as a condition of obtaining or renewing a professional license violate this section?

2. Should this Court grant certiorari to determine whether a state violates the due process clause when it bars a person from obtaining or renewing a professional license for reasons unrelated to occupational competence, to wit, a refusal by the licensee to provide his social security number (SSN), when the argument used by the Appellate Court to refute the petitioner was raised for the first time in its opinion, and never by the defendants, by the trial court, or even by the Appellate Court during oral argument?

3. Whether the petitioner may sue for damages in addition to equitable relief?

Page

TABLE OF CONTENTS

Questions Presented For Review i

Opinions Below 1

Statement Of Jurisdiction 1

Constitutional Provisions And Statutes Involved 1

Statement Of The Case 3

Reasons For Granting The Writ 4

I. This Court Should Decide Whether State Governments Can Require Providing Social Security Numbers As A Condition Of Licensing 5

II. The Ninth Circuit Has Ruled In Direct Contradiction To *Schware v. Board of Bar Exam. of State of New Mexico*, 353 U.S. 232 (1957) 9

III. The Ninth Circuit Has Ruled In Direct Contradiction To *Maine v. Thiboutot*, 448 U.S. 1 (1980) 14

IV. The Ninth Circuit's Opinion Conflicts With Every Other Federal Court That Has Ruled On The Privacy Act 15

Conclusion 17

APPENDICES:

– Appendix A – Judgment of United States District Court for the Eastern District of California (June 23, 1998) 1a

– Appendix B – Order of the United States District Court for the Eastern District of California (June 23, 1998) 2a

Page

– Appendix C – Entry Of Judgment by the United States Court of Appeals for the Ninth Circuit (Filed Dec. 6, 1999) 19a

– Appendix D – Opinion of the United States Court of Appeals for the Ninth Circuit (Filed Sept. 14, 1999).....21a

TABLE OF AUTHORITIES

Cases:

Adler v. Board of Education of City of New York, 342 U.S. 485 (1952).....13

Baird v. State Bar of Arizona, 501 U.S. 1 (1971) 13

Bell v. Burson, 402 U.S. 535, 541 (1971) 12

Brookens v. United States, 627 F.2d 494, D.C. Cir. (1980) 16

Carrington v. Rash, 380 U.S. 89, 96-97 (1965).....12

Chambers v. Klein, 419 F.Supp. 569, D.C.N.J. (1978).....15

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 647 (1974) 12

Cummings v. State of Missouri, 4 Wall. 277, 319-320, 18 L.Ed. 356.....10

Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 10

Doe v. Sharp, 491 F.Supp. 346, D. Mass. (1980).....15

Douglas v. Noble, 261 U.S. 165 (1923)..... 10, 12-13

Doyle v. Wilson, 520 F.Supp. 1343, D. Delaware (1982).....15

Elfbrandt v. Russell, 384 U.S. 11, 17 (1966).....12

Cases, continued: Page

Ex Parte Secombe, 19 How. 9, 13, 15 L.Ed. 565 10

Greater Cleveland Welfare Rights Org. v. Bauer, 462 F.Supp. 1313, N.D. Ohio (1978) 15, 16

Green v. Philbrook, 576 F.2d 440 (2nd Cir. 1978) 15

Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993) 15

Heiner v. Donnan, 285 U.S. 312, 328, 329 (1932).....12

Hoeper v. Tax Commission of Wis., 284 U.S. 206, 215-218 (1931).....12

In re Anastaplo, 366 U.S. 82 (1961).....13

Konigsberg v. State Bar of California, 366 U.S. 36 (1961).....13

Lawton v. Steele, 152 U.S. 137 (1893).....12

Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980) 14

McElrath v. Califano, 615 F.2d 434 (7th Cir. 1980) 15

Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910) 12

Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 10-11

Schlesinger v. State of Wisconsin, 270 U.S. 230, 239-240 (1926).....12

Schware v. Board of Bar Exam. of State of New Mexico, 353 U.S. 232 (1957) 9, 11, 12, 13

Shelton v. Tucker, 364 U.S. 479 (1960) 13

Cases, continued: Page

Slochower v. Board of Higher Ed. of City of New York, 350 U.S. 551 (1956) 10, 12, 13

Smith v. Alabama, 124 U.S. 465 (1887) 12

Smith v. Texas, 233 U.S. 630 (1914) 12

Stanley v. Illinois, 405 U.S. 645, 656 (1972) 12

U.S. Dept. of Agriculture v. Murry, 413 U.S. 508, 513-514 (1973) 12

Vlandis v. Kline, 412 U.S. 441, 449-454 (1973) 12

Watson v. Maryland, 218 U.S. 173 (1909) 12

Wieman v. Updegraff, 344 U.S. 183 (1952) 10, 12

Wolman v. United States of Am., Selective Service Sys., 501 F.Supp. 310, 311, D.C. (1980) 15-16

Yeager v. Hackensack Water Co., 615 F.Supp. 1087, D.C.N.J. (1985) 15, 16

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 11, 12

Statutes:

5 U.S.C. 551(1) and 552a(a)(1) 14

5 U.S.C. 552a(g)(1) 3, 14

7(a)(1) of the Privacy Act of 1974 (PA), 88 Stat. 1896, *et seq.*, Public Law 93-579, 5 U.S.C. 552a (uncodified note) 2-3, 7, 15, 16

28 U.S.C. 1254(1) 1

28 U.S.C. 1291 3

28 U.S.C. 1331 ..... 3, 16, 17

28 U.S.C. 1343(a) 3

28 U.S.C. 2201 3

Statutes, continued; Page

42 U.S.C. 1983 . . . . . 3, 14, 17

Sec. 30 of the California Business and Professions Code 1-2, 4, 6

Other Authorities:

Privacy Act of 1974, P.L. 93-579, Senate Report No. 93-1183, 1974 U.S. Code Cong. & Ad. News 6916 6-9

Roy Richard Dittman, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the United States in and for the Ninth Circuit, entered in the above-entitled case on December 6, 1999.

OPINIONS BELOW

The decision of the Court of Appeals in and for the Ninth Circuit, whose judgment is herein sought to be reviewed, Appellate Case No. 98-16385, was entered on December 6, 1999, and is reprinted with the opinion in Appendix C to this Petition. The prior opinion of the District Court of the United States for the Eastern District of California, District Court Case No. CV-S-97-02047-LKK-GGH, entered on June 23, 1998, is reported in Appendix A to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The statute the petitioner seeks to have declared unconstitutional is sec. 30 of the California Business and Professions Code, the pertinent parts of which say:

> (a) Notwithstanding any other provision of law, any board, as defined in Section 22, and the State Bar and the Department of Real Estate shall at the time of issuance or renewal of the license require that any licensee provide its federal employer ident-

ification number if the licensee is a partnership or his or her social security number for all others.

(b) Any licensee failing to provide the federal identification number or social security number shall be reported by the licensing board to the Franchise Tax Board and, if failing to provide after notification pursuant to paragraph (1) of subdivision (b) of Section 19276 of the Revenue and Taxation Code, shall be subject to the penalty provided in paragraph (2) of subdivision (b) of Section 19276 of the Revenue and Taxation Code.

(c) In addition to the penalty specified in subdivision (b), a licensing board may not process any application for an original license or for renewal of a license unless the applicant or licensee provides its federal employer identification number or social security number where requested on the application.

* * *

(j) It is the intent of the Legislature in enacting this section to utilize the social security account number or federal employer identification number for the purpose of establishing the identification of persons affected by state tax laws and for purposes of compliance with Section 11350.6 of the Welfare and Institutions Code and, to that end, the information furnished pursuant to this section shall be used exclusively for those purposes.

2. Petitioner contends that the above-cited portions of said section violate sec. 7(a)(1) of the Privacy Act of 1974 (PA), 88 stat. 1896, *et seq.*, Public Law 93-579, 5 U.S.C. 552a (uncodified note), states:

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law

because of such individual's refusal to disclose his social security account number.

3. Petitioner also contends that said California statute violates the due process clause of the Fifth Amendment to the United States Constitution, which says:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

4. Petitioner also contends that said California statute violates the second clause of the first section of the Fourteenth Amendment, which says:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Jurisdiction in the district court is found in 5 U.S.C. 552a(g)(1)(D), 28 U.S.C. 1331, 1343(a)(3) and (4), 2201, and 42 U.S.C. 1983. Jurisdiction in the appellate court is found in 28 U.S.C. 1291.

The Petitioner is Roy Richard Dittman, a licensed California acupuncturist since 1983. The Respondents are (1) STATE OF CALIFORNIA, STATE AND CONSUMER AFFAIRS AGENCY, MEDICAL BOARD OF CALIFORNIA, ACUPUNCTURE COMMITTEE, and (2) Marilyn Nielsen. Marilyn Nielsen is the executive officer of the Acupuncture Committee. All of the correspondence from defendants in this case was sent and signed by her. No other natural person is a defendant. Nor is any other natural person known to be, or claimed by the defendants to be, responsible for the conduct at issue herein.

From 1983 until 1996, petitioner obtained his acupuncture license without incident. However, defendants refused to renew his license for 1996-1997 solely because of his refusal to provide a social security number (SSN). They claimed that sec. 30 of the California Business & Processions Code requires them to obtain the number as a condition of issuing or renewing any professional license. Plaintiff contends that not only are defendants' actions unconstitutional, but that Defendant Nielsen's actions recklessly and thoughtlessly violated clearly-established rights which she had an objective duty to know.

The sole questions before this court are whether the defendants acted unconstitutionally, and, if so, whether plaintiff is entitled to damages in addition to equitable relief?

REASONS FOR GRANTING THE WRIT

There are four reasons why this Court should grant the writ, to wit: (1) this case presents an important question of constitutional law, (2) the Ninth Circuit ruled in direct opposition to two recent standing decisions of this Court,

(3) this case presents an important question of federal statutory interpretation, and (4) this case presents a conflict between the Ninth Circuit and every other federal court which heard cases involving the applicability of sec. 7(a)(1) of the Privacy Act to state action.

I.

THIS COURT SHOULD DECIDE WHETHER STATE GOVERNMENTS CAN REQUIRE PROVIDING SOCIAL SECURITY NUMBERS AS A CONDITION OF LICENSING.

That an appellate decision might be wrong, and might even contradict other courts, including the Supreme Court, is not enough to justify this Court in granting the writ. This Court's limited resources must be devoted to cases that have a broad impact on the general public. This is such a case.

This is an issue of national importance. The question of whether or not the government may condition the right to engage in a lawful profession upon providing an SSN affects interests as important as privacy and the right to work. As the technological ability to gather and process data increases, society is inevitably going to be presented with the issue of whether or not the Citizen must "present his papers" as a condition of carrying out the most basic tasks of life, including practicing a profession, driving a car, maintaining a bank account, and even buying and selling. It is an issue that truly affects everyone. There is an avalanche of case law from this Court on free speech. Yet few people ever actually publish anything. There is another avalanche of case law on search and seizure. Yet the bulk of it only affects the (fortunately) small percentage of the public accused of crimes that are *malum in se*. On the other hand, here we have an issue that directly affects everyone, young and old, rich and poor, white and black, male and female, native born and

alien, and yet this Court has given no guidance on the constitutionality of required SSN disclosures. In the 25 years since the Privacy Act was passed, this Court has never had occasion to comment on sec. 7 (the provision that restricts government-sponsored SSN collections). All lower courts acted in accordance with the 1974 law. Now, the Ninth Circuit, breaking ranks with all other federal courts, has created an issue which *may turn out to be the most important social issue of the new century.* The Ninth Circuit has made a ruling necessary.

As technology increases, so will the desire of government and business to demand the SSN as a condition of their services. This of course will greatly diminish privacy, and the more it does so, the more people will object. This Court can clarify this issue now, *before* SSN usage by government and business becomes any more entrenched than it already is. *Afterwards,* any change mandated by this Court will be even more costly to implement.

The facts are simple and uncontested, and the question is forthrightly presented: May a state require SSN disclosure as a condition of granting or renewing a professional license? There are many crimes for which, even after conviction, a person cannot be deprived of his livelihood. But here a person is completely excluded, forever, without any showing of wrongdoing. While it is not contended that sec. 30 is technically "punitive," it imposes an awful burden – and one that even most convicted criminals can't be subjected to.

Nor is petitioner the first or only person to complain about this issue. In the legislative history of sec. 7 of the Privacy Act in 1974, congress observed even then that the SSN is the single greatest threat to personal privacy in modern society:

> The Committee considers this usage of the num-
> of a government file one of the most serious manifestations of privacy concerns in the Nation.

Privacy Act of 1974, P.L. 93-579, Senate Report No. 93-1183, 1974 U.S. Code Cong. & Ad. News 6916, 6943.

The Committee realizes that the number is a major element in the national debate over privacy since a common numerical identifier or symbol to designate and index each person is an essential feature of a national data bank, or indeed, of any information system which allows creation of an instant dossier or which permits quick retrieval of all personal information which flows through that system about an individual.

In recent years the Social Security number has been the identifier most used in common by government agencies and private organizations to improve efficiency of services, aid management functions, prevent fraud and reduce errors in identification of people.

Citizens' complaints to Congress and the findings of several expert study groups have illustrated a common belief that a threat to individual privacy and confidentiality of information is posed by such practices. The concern goes both to the development of one common number to label a person throughout society and to the fact that the symbol most in demand is the Social Security number, the key to one government dossier.

Of major concern is the possibility that the number may become a means of violating civil liberties by easing the way for intelligence and surveillance uses of the number for indexing or locating the person.

In this connection, a Constitutional Rights Subcommittee report on the intelligence-gathering by

the military from its own agents and the files of other Government agencies, shows that individuals were often indexed in the Army computers by their Social Security numbers. Complaints to the Constitutional Rights Subcommittee also showed that government pressures people to disclose their Social Security number on administrative, statistical, and research questionnaires of all kinds, including income tax forms, HEW questionnaires asking whether elderly people buy newspapers and wear false teeth, and many others.

Privacy Act of 1974, P.L. 93-579, Senate Report No. 93-1183, 1974 U.S. Code Cong. & Ad. News 6916, 6944.

At best, individuals may be frustrated and annoyed by unawarranted exchanges of information about them. At worst, they may be threatened with denial of status and benefits without due process, since at the present time record linking and access are, in the main, accomplished without any provision for the data subject to protest, interfere, correct, comment, and in most instances, even to know what linking of which records is taking place for what purposes.

Privacy Act of 1974, P.L. 93-579, Senate Report No. 93-1183, 1974 U.S. Code Cong. & Ad. News 6916, 6944.

The HEW Secretary's committee came to the following conclusions about the need for legislation on this matter: "If the SSN is to be stopped from becoming a de facto Standard Universal Identifier, the individual must have the option not to disclose his number unless required to do so by the Federal Government for legitimate Federal program purposes,

and there must be legal authority for his refusal. Since existing law offers no such clear authority, we recommend specific, preemptive, Federal legislation providing that the individual has the right to refuse to disclose his SSN to any person or organization that does not have specific authority provided by Federal statute to request it . . . and the right to redress if his lawful refusal to disclose his SSN results in the denial of a benefit." [P.6946] The report contained other recommendations about the need for constraints on the use of the number and on its dissemination, and it cited the need for congressional review of all present Federal requirements for use of the number to determine whether they should be continued, repealed, or modified.

Privacy Act of 1974, P.L. 93-579, Senate Report No. 93-1183, 1974 U.S. Code Cong. & Ad. News 6916, 6945, 6946.

This was in 1974. But the debate continues. Groups as diverse as the ACLU and the Rutherford Institute, and membes of congress as diverse as Dianne Feinstein (generally viewed as a left-liberal) and Ron Paul (generally viewed as a right-conservative) have expressed opposition to use the number and introduced remedial legislation.

II.

THE NINTH CIRCUIT HAS RULED IN DIRECT CONTRADICTION TO *SCHWARE v. BOARD OF BAR EXAM. OF STATE OF NEW MEXICO*, 353 U.S. 232 (1957).

The leading case holding that professional licenses cannot be denied for reasons unrelated to occupational competence is *Schware v. Board of Bar Exam. of State of New Mexico*, 353 U.S. 232 (1957), which involved

an applicant to the New Mexico bar who had been denied admission on the grounds of immorality. The Court held, of course, that morality related to the practice of a lawyer, but found that none of the petitioner's activities (previous Communist Party membership, arrests, and use of aliases), under the circumstances, were evidence of bad morals. The denial of his license was therefore an unconstitutional deprivation of due process:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection [P. 239] Clause of the Fourteenth Amendment.
>
> [5. We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. Ex parte Garland, 4 Wall. 333, 379, 18 L.Ed. 366.]

Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623. Cf. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692; Wieman v. Updegraff, 344 U.S. 183, 76 S.Ct. 215, 97 L.Ed. 216. And see Ex parte Secombe, 19 How. 9, 13, 15 L.Ed. 565. **A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.** Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; Cummings v. State of Missouri, 4 Wall. 277, 319-320, 18 L.Ed. 356. Cf. Nebbia v. People of State of

> New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying **permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards,** or when their action is invidiously discriminatory. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.
>
> *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 238, 239, 1957. (Emphasis added).

Schware laid down a two-part test. Under the first part, any condition imposed upon the issuance or retention of a license must relate to occupational competence. Under the second part, there must be an adequate factual basis appearing on the record to support the conclusion that the licensee engaged in the disqualifying conduct.

The Ninth Circuit's argument on the due process issues comes down to this sentence, "Arguably, §30 is another means for all acupuncturists (not merely those who practice in a corporate setting) to demonstrate financial responsibility; an acupuncturist who is incapable of paying, or refuses to pay, child support or taxes is less likely to satisfy potential liabilities owed to patients." (App. 40a) Essentially, the court conclusively presumed that a licensee who refuses to provide his social security number is financially irresponsible, such as being a child support debtor *in the complete absence of any factual basis for this finding.* Indeed, the petitioner is not a child support debtor. Yet it has been much more difficult for him to provide for his children because his license has been taken from him.

An unconstitutional conclusive presumption exists when an otherwise nonexcludable class is classed with

a constitutionally-excludable class, without the opportunity for an individualised hearing to determine the truth of class membership. Under this analysis, the question is whether, if the presumed fact were disproved, would the government be constitutionally barred from denying the benefit? If so, then an unconstitutional conclusive presumption exists. If not, then a "rule of law" exists.

Because the Ninth Circuit's rule applied this conclusive presumption standard, it not only violated the second prong of the *Schware* test, but also violated this Court's numerous decisions against conclusive presumptions. See, *e.g., Mobile, J. & K.C.R. Co. v. Turnipseed,* 219 U.S. 35, 43 (1910), *Schlesinger v. State of Wisconsin,* 270 U.S. 230, 239-240 (1926); *Hoeper v. Tax Commission of Wis.,* 284 U.S. 206, 215-218 (1931); *Heiner v. Donnan,* 284 U.S. 312, 328, 329 (1932); *Wieman v. Updegraff,* 344 U.S. 183 (1952); *Slochower v. Board of Higher Ed. of City of New York,* 350 U.S. 551 (1956); *Carrington v. Rash,* 380 U.S. 89, 96-97 (1965); *Elfbrandt v. Russell,* 384 U.S. 11, 17 (1966); *Bell v. Burson,* 402 U.S. 535, 541 (1971); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972); *Vlandis v. Kline,* 412 U.S. 441, 449-454 (1973); *U.S. Dept. of Agriculture v. Murry,* 413 U.S. 508, 513-514 (1973); and *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 647 (1974).

Nor was *Schware* decided in a vacuum. Although it has become the leading case on the competence standard, it is by no means the only decision of this Cout on that point. Other decisions include the following: *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Smith v. Alabama,* 124 U.S. 465 (1887); *Lawton v. Steele,* 152 U.S. 137 (1893); *Watson v. Maryland,* 218 U.S. 173 (1909); *Smith u Texas,* 233 U.S. 630 (1914); *Douglas v. Noble,* 261 U.S. 165

(1923); *Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952); *Slochower v. Board of Higher Ed. of City of New York*, 350 U.S. 551 (1956); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); and *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

In the instant case, the panel has conceded that the only reason why the *Schware* competence test is satisfied is due to the conclusive presumption that a person who fails to provide an SSN is a child-support debtor or otherwise financially irresponsible. This not only violates the *factual-basis* component of the *Schware* test, but is an unconstitutional conclusive presumption because it is not necessarily and universally true that a person who does not provide an SSN is a child support debtor or otherwise financially irresponsible. Indeed, it is not even true with respect to the petitioner. Also, *this was a new argument invented by the Ninth Circuit in its opinion.* Petitioner has never been accorded even an opportunity for a hearing on this issue.

Although this is an important case, and one that deserves to be fully argued before this Court, it is not a difficult one to decide. This Court could, and Petitioner asks it to, grant summary reversal. Failure to either grant this writ of certiorari or to grant summary reversal is to sanction a direct and unmistakable violation of *Schware* and other standing decisions.

III.

THE NINTH CIRCUIT HAS RULED IN DIRECT CONTRADICTION TO *MAINE v. THIBOUTOT*, 448 U.S. 1 (1980).

The remedial provisions of the Privacy Act (PA), narrowly construed, only names suits against an "agency" (see 5 U.S.C. 552a(g)(1)), and that word is defined so as to only include federal agencies (see 5 U.S.C. 551(1) and 552a(a)(1)). But this does not mean that sec. 7 is unenforceable against the states in federal courts. Congress clearly intended to secure an individual right and meant this right to be enforceable. As was said in the legislative history of this section, "[T]he individual has the right to refuse to disclose his SSN to any person or organization that does not have specific authority provided by Federal statute to request it . . . and the right to redress if his lawful refusal to disclose his SSN results in the denial of a benefit." 1974 U.S. Code Cong. & Ad. News at 6946.

In *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980), this Court held that when a federal statute creates or secures an individual right as against state action, but does not have its own enforcement clause, it is enforceable under 42 U.S.C. 1983. So there are two possibilities. Either the remedial provisions of the Privacy Act are to be broadly construed so as to apply to state action, or sec. 7 is enforceable against state action under sec. 1983. It is untenable to say that it is unenforceable. To do so would be to secure an empty right without a remedy. There is no evidence that this is what congress intended, and no court, until this case, ever so ruled.

IV.

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH EVERY OTHER FEDERAL COURT THAT HAS RULED ON THE PRIVACY ACT.

The Ninth Circuit ruled that there is no remedy for the violation of sec. 7 of the Privacy Act by the states. This ignores the fact that state and local agencies are specifically mentioned in §7. This is an unprecedented ruling in light of the fact that, in the 25 years since the act was passed, §7 has been repeatedly enforced against state agencies in federal court, and no defendant or court has even suggested that it cannot be so enforced. Here is a list of cases where the Act was enforced against state agencies in federal court: *Green v. Philbrook*, 576 F.2d 440, 2nd Cir. 1978; *Chambers v. Klein*, 419 F.Supp. 569, D.C.N.J., 1978; *Greater Cleveland Welfare Rights Org. v. Bauer*, 462 F.Supp. 1313, N.D. Ohio, 1978; *McElrath v. Califano*, 615 F.2d 434, 7th Cir. 1980; *Doe v. Sharp*, 491 F.Supp. 346, D.Mass., 1980; *Doyle v. Wilson*, 520 F.Supp. 1343, D. Delware, 1982; *Yeager v. Hackensack Water Co.*, 615 F.Supp. 1087; D.C.N.J. 1985; and *Greidinger v. Davis*, 988 F.2d 1344, 4th Cir. 1993. Furthermore, the courts have already disposed of challenges to their power to grant relief under §7. For example, in the following case the government argued that courts lack power to grant equitable relief under §7. The court responded:

> Defendants have suggested that the Court lacks injunctive power in these circumstances but they improperly have placed reliance on Section 3 of the Privacy Act which is not applicable. The traditional equity powers of the Court must be exercised in these circumstances in the absence of any indication from Congress of an intention to limit

> the Court's inherent power to enforce the law. *Cf. Brookens v. United States,* 627 F.2d 494 (D.C. Cir. 1980) (action seeking injunction in Section 7 case determined on merits).
>
> *Wolman v. United States of Am., Selective Service Sys.,* 501 F.Supp. 310, 311, D.C. (1980).

So here we have a direct conflict between the First Circuit, which in *Brookens, supra,* applied the general remedial powers of 28 U.S.C. 1331, and the Ninth Circuit, which held in the instant case that the Privacy Act can only be enforced through its own remedial provisions, and these the court construed strictly. In another case involving §7, the court said that this section would be meaningless if it could not be enforced:

> Section 7(b) of the Privacy Act has been construed to provide a private rights of action for prospective relief to redress violations. See *Greater Cleveland Welfare Rights Org. v. Bauer,* 462 F.Supp. 1313, 1319-20 (N.D. Ohio 1978), and cases cited therein. "In the absence of a cause of action to enforce section 7(b) in the federal courts, said action would provide an empty right with no means of enforcement. Such would clearly frustrate the intent of Congress." *Greater Cleveland,* 462 F.Supp. at 1319-20.
>
> *Yeager v. Hackensack Water Co.,* 615 F.Supp. 1087, 1091, D.C.N.J. (1985).

Congress undoubtedly intended to secure an enforceable right with the passage of sec. 7, and every court that has ruled on its application to the states (and the bulk of the case law under sec. 7 relates to state action) has agreed. Unfortunately, congress probably will not respond to a decision of a single circuit. Therefore it will take years of additional litigation until finally this Court grants certiorari and resolves the issue.

This case, if allowed to stand, will create much confusion in the courts about federalism. Does this mean that whenever congress secures a right against state action that said right is meant to be unenforceable in federal court in the absence of a well-written remedial provision? How does this affect the jurisdiction of the federal courts under 28 U.S.C. 1331 and 42 U.S.C. 1983, either of which, on its own, would be broad enough to hear such cases? This Court has never heard a case under sec. 7. Now is the time for a ruling.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX A

[Filed JUN 23 1998]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case Number: CIV S-97-2047 LKK GGH

ROY RICHARD DITTMAN

v.

STATE OF CA, et al.,

JUDGMENT IN A CIVIL CASE

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JUNE 23, 1998.

APPENDIX B

[Filed Jun 23, 1998]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-97-2047 LKK/GGH

ROY RICHARD DITTMAN,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

ORDER

This matter comes before the court on cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56. Pursuant to Local Rule 78-230(h), the court decides the matter on the pleadings and papers on file herein.

I.
THE FACTS[1]

Plaintiff Roy Richard Dittman has been a licensed acupuncturist since 1983. Dittman Decl. at ¶1. He avers that he renewed his license to practice acupuncture in

[1] Unless otherwise noted, the facts referenced herein are undisputed.

1995 without providing a social security number and believed that he could do so again. *Id.* at ¶2.

In applying to renew his professional license for the year 1996-97, plaintiff did not provide his social security number. He received a letter from defendant State of California, Acupuncture Committee on September 21, 1995 informing him that disclosure of his social security number is mandatory and that "[i]f you fail to disclose your social security number or your FEIN, your application for initial or renewal license will not be processed AND you will be reported to the Franchise Tax Board, which may assess a $100 penalty against you." Complaint, Exh. 1, Letter from Acupuncturist Committee to Roy Richard Dittman dated September 21, 1995. His license expired on October 31, 1995. Defendants' Exh. A.

A letter from Marilyn Nielsen of the Acupuncture Committee dated July 17, 1996 provides that the Committee received a letter of complaint from plaintiff dated July 17, 1996 and that "[a] response will be forthcoming." Complaint, Exh. 2. A letter from plaintiff dated October 4, 1996 makes a demand that his license be issued immediately. Complaint, Exh. 3. A letter from the Acupuncture Committee dated April 7, 1997 provides that "[t]he Acupuncture Committee is unable to process your request for renewal of your license to practice acupuncture. The requirements for renewal of your license have been explained to you, in detail, on several occasions." Defendants' Attachment A. From all that appears in the record, to date plaintiff's license has not been renewed.

Plaintiff filed this suit on October 30, 1997. Plaintiff asserts claims under 42 U.S.C. §1983 for violations of Due Process asserting that no conditions unrelated to

competence can be placed on issuance or retention of a professional license. Complaint at ¶7, for violations of (uncodified) section 7(a)(1) of the Privacy Act of 1974, *Id.* at ¶8, for violations of two federal felony statutes, 18 U.S.C. §242 and 42 U.S.C. §408(a)(1), *id.* at ¶¶ 9-11, and declaratory judgment that Cal. Bus. & Prof. Code §30 violates due process. *Id.* at ¶16(2). He seeks both compensatory and punitive damages against defendant Nielsen and seeks injunctive relief preventing defendants from enforcing Cal. Bus. & Prof. Code §30.

II.
SUMMARY JUDGMENT STANDARDS UNDER FED. R. CIV. P. 56

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Owen v. Local No. 169*, 971 F.2d 347, 355 (9th Cir. 1992).

> Under summary judgment practice, the moving party
>
> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it belives demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* Indeed, summary judgment

should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *See also First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in supports of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11; *See also First Nat'l Bank*, 391 U.S. at 289; *Strong v. France*, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific, Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e.,

the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 477 U.S. 248-49; *See also Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U.S. at 290; *See also T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); *See also International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *See also SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)); *See also Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines,*

602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (citation omitted).

III.
THE PRIVACY ACT OF 1974

Plaintiff contends that §7 of the Privacy Act of 1974 bars defendants from compelling him to disclose his social security number for purposes of obtaining his professional license,[2] and disputes that defendants' conduct falls within the exceptions set forth at 42 U.S.C. §405-(c)(2)(C)(i).[3]

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[2] Section 7 provides:

"(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to –

(A) any disclosure which is required by a federal statute."

[3] In 1976, title 42 U.S.C. §405(c)(2)(C)(i) amended the Privacy Act of 1974. This section provides:

"It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor

[footnote continued]

A. Individual Defendant

Defendant Nielsel moves for summary judgment on the claim against her under the Privacy Act of 1974 on grounds that the plain language of the section creating a right of action provides that an action may be brought against the agency, not against an individual. *See* 5 U.S.C. §552a(g)(1) ("may bring a civil action against the agency"). The Ninth Circuit has held that "the civil remedy provisions of the statute do not apply against private individuals," *see Unt. v. Aerospace Corp.*, 765 F.2d 1440 (9th Cir. 1985),[4] and accordingly summary judgment will be granted for defendant Nielsen on this claim.

B. State Agency

Section 7 explicitly provides that it "shall be unlawful for any Federal, State or local government" to deny a benefit based on refusal to disclose a social security number. It is, nevertheless, not clear that an individual can enforce this section against a state agency because the provisions creating a right of action apparently create a right of action only against federal agencies.

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vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Secretary for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number . . . issued to him by the Secretary."

[4] Other circuits are in accord. *See Connelley v. Comptroller of the Currency*, 876 F.2d 1209, 1215 (5th Cir. 1989) ("Congress has crested no cause of action against individual government officials for violating the Privacy Act"); *Brown-Bey v. United States*, 720 F.2d 467, 469 (7th Cir. 1983); *Wren v. Harris*, 675 F.2d 1144, 1148 n.8 (10th Cir. 1982) (holding that "the PA authorizes a civil action only against an agency and not against any individual").

Section 5 U.S.C. §552a(g)(1)(D) creates a right of action for an individual to sue an agency. Section 552-(a)(1) provides that "[f]or purposes of this section – (1) the term 'agency' means agency as defined in §552(e) of this title." In turn, that section refers to agency as defined in section 551(1) of the same title.[5] *See* 5 U.S.C. §552(f).[6] Finally, section 551(1) lists the various federal agencies to which it applies.[7] *See St. Michael's Convalescent v. State of Cal.*, 643 F.2d 1369 (9th Cir. 1981) (holding that under §551(1), " 'agency' does not encompass state agencies or bodies."). Thus, the provision creating a right of action only refers to the right to sue federal agencies, and not state agencies.

C. Eleventh Amendment Immunity

The limitation of this statutory provision to federal agencies is also fatal to plaintiff's contention that the Eleventh Amendment does not bar suit against the state

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[5]Section 552(f) provides:

"(f) For purposes of this section, the term -

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government. . ., or any independent regulatory agency."

[6]Section 552(a)(1) erroneously references §552(e) rather than §552(f) because the reference was not altered when the subsection was updated. *See* Papandreou, *The Potential for Disclosure of Highly Confidential Personal Information*, 20 J.C. & U.L. 79, n.12 (1993).

[7]Section 551(1) provides in relevant part:

"For purposes of this subchapter-

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency"

under this statute. Defendants assert and plaintiff has not disputed that the Acupuncture Committee of the California State Medical Board is a subdivision of the State of California. *See, e.g.*, Cal. Bus. & Prof. Code §4929 (providing for appointment to the Committee). The Eleventh Amendment bars suit against state agencies and departments whether the relief sought is legal or equitable. *See, e.g., Brooks v. Sulphur Springs Valley Elec. Co-op*, 951 F.2d 1050 (9th Cir. 1991).

Plaintiff contends that by providing in §7 that the State (as well as local and federal agencies) shall not require disclosure of a social security number, that Congress has abrogated the Eleventh Amendment immunity of the states for suits under this section. In order to determine whether Congress has abrogated the state's sovereign immunity, the court applies the two-part test articulated in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Courts must consider "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity' . . . and second, whether Congress has acted 'pursuant to a valid exercise of power.' " *Id.* at 55.

As set forth above, it is not at all clear that in section 552a(g)(1)(D) Congress created a right of action against state agencies rather than only against federal agencies. Accordingly, I cannot agree that in the Privacy Act of 1974 Congress has abrogated the Eleventh Amendment immunity of the states by "unmistakably clear language." *Welch v. Texas Dep't of Hwys & Pub. Transp.*, 483 U.S. 468, 478 (1987). Neither has plaintiff established that if Congress intended to abrogate the Eleventh Amendment immunity of the states in the Privacy Act of 1974 that it was acting pursuant to a valid exercise of power.

In sum, either because in the Privacy Act of 1974 Congress has not provided a right of action against state

agencies, or because Congress has not abrogated the Eleventh Amendment immunity of the states, summary judgment will be granted for the state Acupuncture Committee on plaintiff's claim under the Privacy Act.

IV.
DUE PROCESS

Defendants next move for summary judgment on plaintiff's Due Process claim under 42 U.S.C. §1983 on grounds that suit is barred by the Eleventh Amendment and/or the statute of limitations. I consider these contentions in turn.

A. Eleventh Amendment

Congress has not abrogated the Eleventh Amendment immunity of the states for suits under 42 U.S.C. §1983. *See Quern v. Jordan* 440 U.S. 332 (1979). Accordingly, plaintiff's claim against the Acupuncture Committee for violations of substantive due process must also be granted. *See, e.g., Brooks v. Sulphur Springs Valley Elec. Co-op,* 951 F.2d 1050 (9th Cir. 1991) (holding that Eleventh Amendment bars suit against State agencies).

I next consider whether plaintiff's §1983 claim against individual defendant Nielsen for alleged violations of substantive due process is barred by the Eleventh Amendment. Plaintiff seeks, *inter alia,* injunctive relief prohibiting defendant Nielsen from refusing to renew his application. He alleges that he "still desires to see [his license] renewed so he can return to his chosen profession, and he has, in fact, kept up with all his continuing education requirements." Complaint at ¶ 6.

The Supreme Court has reaffirmed the continuing validity of the *Ex Parte Young* doctrine, *see Idaho v.*

Cour d'Alene, ___ U.S. ___ , 138 L.Ed.2d 438, 455 (1997) ("[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* viction"), and thus the Eleventh Amendment does not bar plaintiff from suing defendant Nielsen, a state official, in a federal court for prospective injunctive relief only.[8] The court next considers whether this claim is barred by the statute of limitations.[9]

B. Statute Of Limitations

Because 42 U.S.C. §1983 does not contain a statute of limitations, courts borrow the most closely analogous statute of limitations from state law. The Ninth Circuit has held that California's one-year personal injury statute is the most closely analogous statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261 (1985) (citing Cal. Civ. Proc. Code §340(3)).

Even though state law determines the length of the limitations period in a §1983 action, federal law governs in determining when plaintiff's claim accrued. *See Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991). In determining which event commences the

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[8] However, suit against Nielsen in her official capacity for damages is equivalent to suit against the state, *see Hafer v. Melo*, 502 U.S. 21, 26 (1991), and thus the Eleventh Amendment bars plaintiff from seeking damages against defendant Nielsen in her official capacity for violations of due process.

[9] Having concluded that plaintiff's claim under the Privacy Act of 1974 is barred by the Eleventh Amendment, the court need not reach defendants' contention that the Privacy Act claim is barred by the two-year statute of limitations, nor resolve questions about when that claim accrued.

running of the limitations period, the court must identify precisely the practice complained of. *Id.* at 319.

As I now explain, a claim for past damages is barred by the one-year statute of limitations. For this reason, the court need not consider plaintiff's claims against defendant Nielsen in her personal capacity for damages.[10] Under federal law, a claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of his action." *Id.*

In the case at bar, plaintiff was informed on September 21, 1995 that his license would not be renewed without providing his social security number. Complaint, Exh. 1. Relying on the Ninth Circuit's decision in *Hoesterey*, he argues that the statute of limitations did not begin to run until the decision was final. This is a misreading of *Hoesterey*.

As the Ninth Circuit explained, "[t]he different practices challenged in these cases necessarily affect the point in time at which the statute of limitations begins to accrue." *Id.* at 320. In the case before the Court in *Hoesterey*, the plaintiff asserted a violation of procedural due process and the Court therefore held that "notification of the decision to terminate him at a later time would not alert him to the specific practices challenged here: the fact that no more process would be forthcoming prior to termination." On this basis, the court distinguished the procedural due process claim from cases challenging the adverse action itself; the latter claims accrued at the time the plaintiff learned of the adverse action.

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[10] The Supreme Court has rejected the view that "state officials may not be held liable in their personal capacity for actions they take in their official capacity." *Hafer v. Melo*, 502 U.S. 21, 26 (1991).

Given that a claim for damages for the past denial of plaintiff's license is a challenge to the denial itself, and does not merely challenge a procedural failure in the manner that plaintiff's license was denied, plaintiff's claim accrued when he had reason to know of the denial. Even if this claim did not accrue until his license expired without renewal on October 31, 1995, the claim was barred by the applicable one-year statute of limitations when this suit was filed on October 30, 1997.

In contrast, plaintiff's claim for prospective relief enjoining defendant Nielsen from allegedly continuing to violate his Due Process rights by refusing to renew his license is an ongoing violation and plaintiff last sought renewal less than one year prior to filing suit. *See* Defendants' Attachment A. Accordingly, plaintiff's claim against defendant Nielsen for prospective injunctive relief is not barred by the statute of limitations. The court therefore turns to the merits of plaintiff's due process claim.

C. The Merits

It is undisputed that the only basis for the failure to renew plaintiff's acupuncture license is his refusal to provide his social security number. In order to prevail on a due process claim, the plaintiff must first demonstrate the violation of some "liberty" or "property" interest.

Property interests are not created by the Constitution, but rather by 'existing rules or understandings that stem from an independent source such as state law.' *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The court must determine whether state law confers an expectation of entitlement to continued licensing that would give rise to a property interest protected by the Constitution. The Ninth Circuit has held that "a first-time application

has no protected property interest in a new . . . license," *Kraft v. Jacka*, 872 F.2d 862, 866 (9th Cir. 1989), and that an applicant whose license has expired is in the same position as a first time applicant.

Even if the plaintiff does not have an expectation of entitlement in a license to practice acupuncture and therefore does not have a *property* interest, nevertheless, barring an individual from access to an entire profession implicates a *liberty* interest. *See Hampton v. Mow Sung Wong*, 426 U.S. 88, 102 (1976) (holding that "ineligibility for employment in a major sector of the economy [ ] is of sufficient significance to be characterized as a deprivation of an interest in liberty").[11]

Plaintiff has not alleged that he did not have proper notice or an opportunity to have his case heard and thus it does not appear that he is asserting a procedural due process claim. Rather, plaintiff's claim appears to assert a violation of substantive due process. In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), the Court held that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." The Court also held that an applicant could not be excluded for an invidiously discriminatory reason such as "merely because he was a Republican or a Negro or a member of a particular church." *Id.* at 239. In the case before it, the Court concluded that prior membership in the Com-

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[11] In *Hampton*, the Supreme Court held that a rule barring legal resident aliens from federal civil service employment was a deprivation of liberty.

munist Party did not justify an inference that an applicant to the bar presently had bad moral character.

In the case at bar, plaintiff has not made any argument that the requirement of a social security number or federal employment identification number invidiously discriminates against a particular class.[12] Accordingly, the state must only satisfy the rational basis test. Defendants act pursuant to Cal. Bus. & Prof. Code §30, which provides:

> "[i]t is the intent of the Legislature in enacting this section to utilize the social security account number or federal employer identification number for the purpose of establishing the identification of persons affected by state tax laws and for purposes of complaint with Section 11350.6 of the Welfare and Institutions Code[13] and, to that end, the information furnished pursuant to this section shall be used exclusively for those purposes."

The State clearly has a legitimate interest in collecting child support, *see Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (assuming that fulfilling child support obligations is a "legitimate and substantial interest[ ]"), and in col-

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[12] "When a statutory classification significantly interferes with any exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

[13] Section 11350.6 provides in relevant part:

> "[A]ll boards shall collect social security numbers from all applicants for the purposes of matching the names of the certified list provided by the State Department of Social Services to applicants and licensees and of responding to requests for this information made by child support agencies."

Cal. Welf. & Inst. Code §11350.6(d).

lecting taxes, and plaintiff has not made any argument that withholding a professional license is not an effective means of furthering those interests. Because the State's conduct is rationally related to a legitimate state interest, summary judgment will be granted for defendants on plaintiff's claim that requiring his social security number pursuant to Cal. Bus. & Prof. Code §30 for the issuance of a professional license violates substantive due process.

V.
FEDERAL PENAL STATUTES

Plaintiff's claims for damages premised on his assertion that defendants are in violation of 18 U.S.C. §242 cannot prevail. There is no private cause of action to enforce this federal criminal statute. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092, (9th Cir. 1980) (dismissing claims under 18 U.S.C. §§241 and 242 because "[t]hese criminal provisions [ ] provide no basis for civil liability"). Plaintiff's claim under 42 U.S.C. §408-(a)(8)[14] fails for the same reason and summary judgment will be granted for defendants on both claims.

VI.
ORDERS

For all of the foregoing reasons, the court makes the following ORDERS:

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[14]Section 408(a)(8) provides:

"Whoever- . . .

(8) discloses, ises, or compels the disclosure of the social security number of any person in violation of the laws of the United States; shall be guilty of a felony . . ."

1. Defendants' motion for summary judgment is GRANTED and plaintiff's cross-motion for summary judgment is DENIED;

2. The hearing set for June 15, 1998 is VACATED;

3. The Order to Show Cause for failure to file a timely opposition is DISCHARGED; and

4. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: June 18, 1998.

/s/ Lawrence K. Karlton
Lawrence K. Karlton
Chief Judge Emeritus
United States District Court

APPENDIX C

[Filed Dec -6 1999]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16385
CT/AG#: CV-97-02047-LKK/GGH

ROY RICHARD DITTMAN

Plaintiff-Appellant

v.

STATE OF CALIFORNIA; STATE AND CONSUMER AFFAIRS AGENCY; MEDICAL BOARD OF CALIFORNIA; ACUPINCTURE COMMITTEE; ACUPUNCTURE COMMITTEE; MARILYN NIELSEN

Defendants-Appellees

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 09/14/99

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16385

Roy Richard DITTMAN,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; State and Consumer Affairs Agency; Medical Board of California; Acupuncture Committee; and Marilyn Nielsen,

Defendants-Appellees.

Argued and Submitted Aug. 11, 1999.

Filed Sept. 14, 1999

Thomas George Key, Bartholomew, Henry & Key, Tustin, California; Jim Turner, Swankin & Turner, Washington, D.C.; and J. Lee Boothby, Vista, California, for the plaintiff-appellant.

Jill Buttram, David F. DeAlba, Deputy Attorney Generals, Sacramento, California, for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California. Lawrence K. Karlton, District Judge, Presiding, D.C. No. CV-97-02047-LKK-GGH.

Before: NOONAN, DAVID R. THOMPSON, and GRABER, Circuit Judges.

GRABER, Circuit Judge:

Plaintiff, Roy Dittman, appeals from the district court's grant of summary judgment in favor of defendants the State of California Acupuncture Committee (Committee) and Marilyn Nielsen, whom Plaintiff sued in her individual capacity and in her official capacity as Executive Officer of the Committee. Plaintiff alleged that Defendants' refusal to renew his license to practice acupuncture unless he first disclosed his social security number, as required by California law, violated both his right to due process under the Fourteenth Amendment and §7(a)(1) of the Privacy Act (uncodified), 5 U.S.C.A. §552a (note), Pub.L. No. 93-579, 88 Stat. 1896, *et seq.* We affirm.

BACKGROUND

The facts of this case are undisputed. From 1988 to 1995, Plaintiff was a licensed acpuncturist in the State of California. On September 21, 1995, Plaintiff received a form letter from the Committee notifying him that, under revised §30 of the California Business and Professions Code,[1] the disclosure of his social security number

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[1] That statute provides in relevant part:

(a) Notwithstanding any other provision of law, any board, as defined in Section 22, and the State Bar and the Department of Real Estate *shall at the time of issuance or renewal of the license require that any licensee provide its federal employer identification number if the licensee is a partnership or his or her social security number for all others.*

(b) Any licensee failing to provide the federal identification number or social security number shall be reported by

[footnote continued]

was a necessary condition to the renewal of his license. The letter warned that, "[i]f you fail to disclose your social security number . . . , your application for initial or renewal license will not be processed." Plaintiff, whose license expired on October 31, 1995, objected to the disclosure requirement.

On July 17, 1996, Plaintiff received a second letter from the Committee, signed by defendant Nielsen. That letter stated that the Committee had received Plaintiff's complaint and that "[a] response will be forthcoming." After hearing nothing for three months, Plaintiff wrote to the Committee on October 4, 1996, demanding immediate issuance of his license. Plaintiff received no response until April 7, 1997, when the Committee informed him that "[t]he Acupuncture Committee is unable to process your request for renewal of your license to practice acupuncture. The requirements for renewal of your license have been explained to you, in detail, on several occasions."

On October 30, 1997, Plaintiff filed this action pursuant to 42 U.S.C. §1998, alleging that Defendants' refusal to renew his license violated the due process

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the licensing board to the Franchise Tax Board and, if failing to provide after notification pursuant to paragraph (1) of subdivision (b) of Section 19528 of the Revenue and Taxation Code, shall be subject to the penalty provided in paragraph (2) of subsection (b) of Section 19528 of the Revenue and Taxation Code.

(c) In addition to the penalty specified in subdivision (b), *a licensing board may not process any application for an original license or for renewal of a license unless the applicant or licensee provides its federal employer identification number or social security number where requested on the application.*
(Emphasis added.)

clause of the Fourteenth Amendment. Plaintiff also alleged that requiring disclosure of his social security number as a condition of licensure violated §7(a)(1) of the Privacy Act. Plaintiff sought both damages and prospective injunctive relief, i.e., the issuance of his license. The district court granted summary judgment in favor of Defendants as to all claims.

Plaintiff brought this timely appeal.

STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *See San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998). We likewise review de novo the constitutionality of a statute. *See California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999). "A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are also reviewed de novo." *Id.*

DISCUSSION

I. MOOTNESS

At oral argument, Defendants conceded that they had obtained Plaintiff's social security number through the use of an electronic database. Although Defendants did not assert that their possession of the social security number rendered this case moot, we have an independent obligation to address sua sponte whether this court has subject-matter jurisdiction. *See Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1481 (9th Cir. 1995). We conclude that we do.

"Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal inter-

est that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999) (citations and internal quotation marks omitted). "If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction." *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999).

Plaintiff's claims for relief continue to present a live controversy for two reasons. First, as we read §30, even if Defendants have obtained Plaintiff's social security number through independent means, Defendants do not have the authority to issue a license to him. The statute provides that "a licensing board *may not process* any application for an original license or for renewal of a license *unless the applicant or licensee provides* [his or her] . . . social security number where requested on the application." Cal. Bus. & Prof. Code §30(c) (emphasis added). As is plain, §30 mandates that *an applicant must disclose* his or her own social security number before the licensing authority may process the request for an application. The social security number must come from the applicant, perhaps to avoid the possibility of mistaken identity. Section 30 does not authorize the licensing authority to act if it acquires the applicant's social security number only from an independent source. Thus, in this case, Defendants may not process Plaintiff's request for renewal using a social security number obtained from an independent source. Were Defendants to do so, they would exceed the scope of their statutory authority.

Moreover, even if Defendants theoretically could have exceeded the scope of their authority by issuing Plaintiff

a license, they have not done so. Defendants steadfastly maintain that, unless Plaintiff himself discloses his social security number, he cannot obtain a license under §30. As discussed above, Defendants' position is consistent with the text of the statute.

In summary, because Defendants, consistent with §30, continue to deny Plaintiff a license to practice acupuncture, Plaintiff's claims have not been rendered moot by Defendants' acquisition of Plaintiff's social security number.

II. CLAIMS AGAINST THE COMMITTEE

Plaintiff asserted claims against the Committee under both §1983 and the Privacy Act. Neither claim is viable.

A. *Due Process Claim Under §1983*

Plaintiff's §1983 claim against the Committee for allegedly violating the due process clause is barred by the Eleventh Amendment. In the absence of a waiver by the state or a valid congressional override, "[u]nder the eleventh amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court." *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1989). The State of California has not waived its Eleventh Amendment immunity with respect to claims brought under §1983 in federal court, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S.Ct. 8142, 87 L.Ed.2d 171 (1985) (holding that the California Constitution does not waive immunity from federal court jurisdiction), and the Supreme Court has held that "§1983 was not intended to abrogate a State's Eleventh Amendment immunity," *Kentucky v. Graham*, 473 U.S. 159, 169 n.17, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Indeed, Plaintiff does not contest that the Committee is a governmental agency of the State of California entitled to Eleventh Amendment immunity. Accordingly, the district court properly dismissed Plaintiff's §1983 claim against the Committee.

B. *The Privacy Act*

Section 7(a)(1) of the Privacy Act provides that "[i]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 5 U.S.C.A. §552a (note). Although the protection afforded by the Privacy Act is broad, its civil remedy provision is far less expansive. This court has held that the private right of civil action created by the Privacy Act, *see* 5 U.S.C. §552a(g)(1) (providing that a private individual "may bring a civil action against the agency"), "is specifically limited to actions against agencies of the United States Government. The civil remedy provisions of the statute do not apply against private individuals, *state agencies,* private entities, or state and local officials," *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir. 1985) (citations omitted) (emphasis added); *see also St. Michael's Convalescent Hosp. v. California,* 643 F.2d 1869, 1373 (9th Cir. 1981) (holding that the Privacy Act provides no private right of action against "state agencies or bodies"). Accordingly, the Privacy Act provides Plaintiff with no private cause of action against the Committee.

Plaintiff counters that, even if the Privacy Act itself provides no remedy against the Committee, §1983 may serve as a vehicle to redress violations of that statute. *See Legal Servs. v. Arnett,* 114 F.3d 135, 138 (9th Cir.

1997) ("It is well established that §1983 provides a private right of action for violations of federal statutes in some instances."). Even if we assume, without deciding, that Plaintiff's argument is correct, the Committee is entitled to sovereign immunity under the Eleventh Amendment, as we already have held. Thus, Plaintiff cannot maintain a Privacy Act claim against the Committee, either directly under §552a(g)(1) or derivatively through §1983.

In summary, the district court properly granted summary judgment in favor of the Committee as to all claims.

III. CLAIMS AGAINST DEFENDANT NIELSEN

A. *Due Process Claim Under §1983*

Plaintiff sued defendant Nielsen both in her individual capacity and in her official capacity as Executive Officer of the Committee, for both damages and prospective injunctive relief. Whether Plaintiff stated a cognizable §1983 claim against Nielsen depends on two factors: (1) the capacity in which Plaintiff sued her and (2) the nature of the relief sought.

1. *Official Capacity*

The Eleventh Amendment bars actions for damages against state officials who are sued in their official capacities in federal court. *See Graham*, 473 U.S. at 169, 105 S.Ct. 3099. "That is so because . . . a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents." *Id.* (citation and internal quotation marks omitted). However, "a federal court, consistent with the Eleventh Amendment, may *enjoin* state officials to conform their future conduct to the requirements of federal law."

Quern v. Jordan, 440 U.S. 332, 337, 98 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (emphasis added). Accordingly, Plaintiff stated a cognizable due process claim against defendant Nielsen in her official capacity, but only for prospective injunctive relief. We will evaluate the merits of that claim now.

2. *Personal Capacity*

"Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law." *Graham*, 473 U.S. at 165, 105 S.Ct. 3099. A public official, however, is not subject to personal liability if she is entitled to qualified immunity. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 488 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

This court has held that, when a public official acts in reliance on a duly enacted statute or ordinance, that official ordinarily is entitled to qualified immunity. *See Grossman v. City of Portland*, 33 F.3d 1200, 1210 (9th Cir. 1994) (holding that "an officer who reasonably relies on the legislature's determination that a statute is constitutional should be shielded from personal liability"). The existence of an authorizing statute is not dispositive, however. Qualified immunity does not extend to a public official who enforces a statue that is "patently violative of fundamental constitutional principles." *Id.* at 1209.

Here, in refusing to renew Plaintiff's license, defendant Nielsen acted pursuant to a duly enacted state statute, California Business and Professions Code §30. At the time of the refusal, there was no clear case law in either the federal courts or the state courts of California establishing that the issuance of a professional license may not be conditioned on the licensee's disclosure of her social security number.[2] Moreover, on its face, §30 does not authorize "official conduct which is patently violative of fundamental constitutional principles." *Grossman*, 33 F.3d at 1209. We therefore conclude that, in the circumstances, it was reasonable for defendant Nielsen to believe that §30 was constitutional and to enforce its mandates against Plaintiff. Accordingly, Nielsen is entitled to qualified immunity against Plaintiff's claim for damages under §1983.[3]

B. *Privacy Act Claim*

Plaintiff also alleged that defendant Nielsen's actions violated the Privacy Act. As discussed, "[t]he civil remedy provisions of the [Privacy Act] do not apply against *private individuals*, state agencies, private enti-

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[2] Indeed, after the enactment of §30, one commentator observed that the constitutionality of the statute was *uncertain* under existing case law. *See* Luke Foster, Comment, *Review of Selected 1991 California Legislation*, 23 Pac. L.J. 510, 621-22 (1992) (observing that, depending on the standard used, §30 may or may not be constitutional).

[3] The district court did not reach the issue of qualified immunity, because it held that Plaintiff's claim for damages under §1983 was time-barred. However, this court may affirm on any ground supported by the record. *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 874 (9th Cir. 1987). We express no view as to the district court's statute-of-limitations analysis.

ties or *state and local officials.*" *Unt*, 765 F.2d at 1447 (citations omitted) (emphasis added). Accordingly, the Privacy Act provides Plaintiff with no private cause of action against Nielsen in either her personal or her official capacity.

Once again, Plaintiff counters that, even if the Privacy Act itself does not provide a private cause of action, §1983 can serve as a vehicle to redress violations of the Privacy Act. This court has not yet addressed that issue.

"It is well established that §1983 provides a private right of action for violations of federal statutes in some instances. However, §1988 relief is available only if the statute creates enforceable rights and if Congress has not foreclosed such enforcement in the statute itself." *Legal Servs.*, 114 F.3d at 138 (citation omitted). "A statute creates a right enforceable under §1983 if: (1) the statute was intended to benefit the plaintiffs; (2) the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct, and; (3) the interest asserted by the plaintiff is not so vague or amorphous that it is beyond the competence of the judiciary to enforce." *Id.*

Section 7(a)(1) of the Privacy Act satisfies each of the foregoing requirements. *First*, Congress clearly enacted §7(a)(1) to benefit individuals such as Plaintiff. The purpose of the Privacy Act, Congress stated, was "to provide certain safeguards for an individual against an invasion of personal privacy." 5 U.S.C.A. §552a (note), Pub.L. No. 93-579, §2. Toward that end, §7(a)(1) prohibits "any Federal, State or local government agency to deny *any individual* any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number," except as otherwise provided

under the Privacy Act. 5 U.S.C.A. §552a (note) (emphasis added). The breadth of §7(a)(1)'s protection encompasses the privacy interest asserted by Plaintiff here.

Second, the statutory obligation imposed on governmental bodies is clear: A governmental body may not deny any individual any right, benefit, or privilege because she refuses to disclose her social security number, unless otherwise permitted by law.

Third, the judiciary is capable of enforcing the interest asserted by Plaintiff. The text of §7(a)(1) and, more generally, the Privacy Act itself, is not so "vague and amorphous such that is is beyond the competence of the judiciary to enforce." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990); *cf. Legal Servs.*, 114 F.3d at 139 (holding that a statute mandating that an agency select the "best" able to provide a service was too vague and amorphous to enforce under §1983).

Our inquiry does not end there, however. "Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under §1983." *Blessing v. Freestone*, 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). The question then becomes whether Congress "specifically foreclosed a remedy under §1983." *Id.* (citation and internal quotation marks omitted). "Congress may do so expressly, by forbidding recourse to §1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Id.*

In *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983), the Seventh Circuit confronted an issue similar to the one presented here. There, the question was whether §1983

provided a remedy against a state official for allegedly violating 42 U.S.C. §3789g(a), which prohibits governmental entities from disclosing certain statistical information. The Seventh Circuit held that §1983 could not be used to remedy alleged violations of §3789(g) by state or local officials. The court's reasoning is worthy of quotation in full,

> [W]e believe that Congress has foreclosed the use of Sec. 1983 as a remedy. Congress, by enacting the Privacy Act of 1974, has provided comprehensive private remedies for unwarranted disclosures of personal information, including the type of information disclosed here. This act, however, applies only to agencies of the United States Government. Congress, when considering this legislation, specifically limited its scope to federal agencies. Indeed, the bill, as originally introduced, contained a remedy for improper disclosures by state authorities; these provisions were deleted, however, because of the uncertain effect of such a provision and because Congress felt that it lacked the necessary information for devising a remedial scheme in this context.
>
> Congress, by limiting the scope of Sec. 552a, has provided unequivocal and persuasive evidence that it intended "to foreclose private enforcement" of Sec. 3789g(a) against state or local officials who make unwarranted disclosures of statistical information.

Id. at 752 (citations and footnote omitted).

The Seventh Circuit's reasoning applies squarely to the present case, and we are persuaded by it. Although the prohibitions of §7(a)(1) apply to all governmental entities, including state and local governments, by limiting the scope of the Privacy Act's civil remedy provision, 5 U.S.C. §552a(g), Congress clearly intended to "foreclose

private enforcement" against any entity *other than* federal agencies. Admittedly, this reasoning leaves individuals, such as Plaintiff, without a means of enforcing §7(a)(1) against state and local officials. However, were we to hold that Plaintiff could pursue a Privacy Act claim under §1983, we would circumvent the intent of Congress that the rights secured by the Privacy Act be enforceable only against federal agencies.

In summary, we conclude that a private plaintiff may not maintain an action against a state official – either in her official or her individual capacity – under §1983 to remedy alleged violations of §7(a)(1) of the Privacy Act. The district court therefore properly granted summary judgment in favor of defendant Nielsen as to Plaintiff's claim under the Privacy Act.

C. *The Merits of Plaintiff's Substantive Due Process Claim*

In the end, Plaintiff's only viable claim is one for prospective injunctive relief against defendant Nielsen in her official capacity for allegedly violating the due process clause of the Fourteenth Amendment. "A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).

In an early line of cases, the Supreme Court recognized "that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 119 S.Ct. 1292, 1295-96, 143 L.Ed.2d 399 (1999) (citing *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889),

and *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915)); *see also Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S Ct. 2701, 33 L.Ed.2d 548 (1972) (stating that the liberty interest guaranteed by the Fourteenth Amendment includes the right "to engage in any of the common occupations of life") (citation and internal quotation marks omitted). This court similarly has observed that "it is well-recognized that the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations." *Wedges/Ledges*, 24 F.3d at 65 n.4. Although the precise contours of that liberty interest remain largely undefined, the Supreme Court observed recently that the line of authorities establishing the liberty interest "all deal[t] with a complete prohibition of the right to engage in a calling," and not merely a "brief interruption" in one's ability to pursue an occupation or profession. *Conn*, 119 S.Ct. at 1296.

Section 30's disclosure requirement imposes the type of "complete prohibition" on entry into a profession that implicates a person's liberty interest in pursuing an occupation or profession of her own choice. As illustrated by the facts of this case, the operation of §30 is clear: If a person seeking an acupuncture license refuses to disclose her social security number, she may not practice that profession in the State of California. Thus, like minimal education and testing requirements, which California also demands of prospective acupuncturists, *see* Cal. Bus. & Prof. Code §4988 (stating initial requirements of licensure), §30 operates as a complete barrier to entry into the profession of acupuncture.

Having concluded that Plaintiff's due process claim is predicated on a protected liberty interest, the question then arises: To what degree of constitutional scrutiny is

the regulation subject? The Supreme Court answered that question in a case involving admission to the practice of law, *Schware v. Board of Bar Exam'rs*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). There, the Court held that "[a] State cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Id.* at 238-39, 77 S.Ct. 752 (emphasis added). The Court stated that, consistent with the Fourteenth Amendment, "[a] State can require high standard of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but *any qualification must have a rational connection with the applicant's fitness or capacity to practice law.*" *Id.* at 239, 77 S.Ct. 952 (emphasis added). From *Schware* emerges the fundamental principle that "[r]egulations on entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Lowe v. SEC*, 472 U.S. 181, 228, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring) (quoting *Schware*, 353 U.S. at 239, 77 S.Ct. 752).

Defendants contend, and the district court agreed, that §30's disclosure requirement withstands constitutional scrutiny, because it is rationally related to the legitimate state interests of collecting taxes and child support. *See* Cal. Bus. & Prof. Code §30(f).[4] The Committee also

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[4] That statute provides:

It is the intent of the Legislature in enacting this section to utilize the social security account number . . . for the purpose of establishing the identification of persons affected by state laws and for purposes of compliance with Section

[footnote continued]

concedes that it uses the social security numbers of applicants for no other purpose.

Recently, this court addressed whether the policy of the State of California to refuse to renew drivers' licenses unless the driver first discloses her social security number violates the Free Exercise Clause. *See Miller v. Reed*, 176 F.3d 1202 (1999). In holding that California's policy did *not* violate the right of free exercise, this court observed that California's disclosure policy was "rationally related to California's legitimate interests in locating the whereabouts of errant parents for purposes of carrying out child support programs, collecting tax obligations, and collecting amounts overdue and unpaid for fines, penalties, assessments, bail, and vehicle parking penalties." *Id.* at 1207.

Although related to the present case, *Miller* is not controlling. In *Miller*, the applicable constitutional inquiry was whether the authorizing statute was "a *rationally based*, neutral law of general applicability [that] does not violate the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *Id.* at 1206 (citation omitted) (emphasis added). In short, the court used a "pure" rational-basis test to evaluate the challenged statute. Here, by contrast, the relevant test requires something more. As *Schware* makes clear, although a state may regulate entry into a profession, any such regulation must be rationally related, not merely to a legitimate state interest, but

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11350.6 of the Welfare and Institutions Code and, to that end, the information furnished pursuant to this section shall be used exclusively for those purposes. Section 11350.6 of the Welfare and Institutions Code in turn deals with the enforcement of child support orders or judgments and the authority to withhold issuance or renewal of a license.

more specifically to the "the applicant's fitness or capacity to practice" the profession itself. *Schware*, 353 U.S. at 239, 77 S.Ct. 752. Thus, Defendants' and the district court's analysis of whether §30's disclosure requirement is rationally related to a legitimate state interest is incomplete. The proper inquiry is whether the disclosure requirement and its consequent revelation of an individual's delinquicy of paying taxes or child support obligations bears a rational relationship to her fitness or capacity to practice acupuncture.

In addressing that issue, we first must ask ourselves a threshold question: In applying the test under *Schware*, is this court bound by the written reasons that the California state legislature articulated for enacting §30, or may this court consider any hypothetical basis on which the legislature might have acted? If we are bound by the stated reason for the enactment of §30, we may ask only whether the state's interest in collecting taxes and child support is rationally related to an applicant's fitness or capacity to practice acupuncture. *See* Cal. Bus. & Prof. Code §30(f) (stating the legislative purpose of §30); *see also, e.g.*, California State Assembly Committee on Judiciary, Committee Report on A.B. No. 1394, 1991-92 Reg. Sess (1991) ("The author states that this bill provides additional enforcement tools for collection of support and additional incentive to obligors to pay their support."). If not, then we may take a more expansive view of the purposes of §30 in evaluating its constitutionality.

Where, as here, a plaintiff relies on substantive due process to challenge a legislative act that does not infringe on a fundamental right,[5] the plaintiff bears a heavy

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[5]We emphasize that the Supreme Court has recognized only that the *liberty* component of the Fourteenth Amendment's Due

[footnote continued]

burden. "[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1995) (citation and internal quotation marks omitted) (emphasis in original). In other words, we need to determine only whether the legislation has a "conceivable basis" on which it might survive constitutional scrutiny. *See Lupert v. California State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985) (applying the "conceivable basis" standard to a challenge to the California State Bar's requirement that law students attending unaccredited schools take and pass examinations that are not required of students attending accredited institutions). It is therefore irrelevant for constitutional purposes whether, at the time the legislature acted, it articulated the "conceivable basis" for the legislation. *See Kim v. United States*, 121 F.3d 1269, 1274 (9th Cir. 1997) ("The government need not state its purposes at the time it acts. It is sufficient that the government could have had a legitimate reason for acting as it did."). Rather, "[t]he plaintiff must establish that the facts on which the legislature may have relied could not reasonably have been conceived as true by the governmental decisionmaker." *Lupert*, 761 F.2d at 1328.

Here, the legislature could have had in mind at least two rational bases for relating §30's disclosure require-

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Process Clause "includes some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 119 S.Ct. 1292, 1295-96, 143 L.Ed.2d 399 (1999). The Court has never held that the "right" to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny.

ment to a person's capacity and fitness to practice acupuncture. First, the state might have enacted §30 to ensure that acupuncturists have the financial wherewithal to answer liability claims asserted by patients. In an analogous context, the California state legislature has recognized that an "acupuncture corporation" (that is, one or more licensed acupuncturists who practice in a corporate form) may be required to demonstrate its capacity to pay claims made by patients. *See* Cal. Bus. & Prof. Code §4979 (stating that the Committee may adopt and enforce regulations requiring an acupuncture corporation to "provide adequate security by insurance or otherwise for claims against it by its patients arising out of the rendering of professional services"). That statute evidences a legislative recognition of the importance of financial accountability to patients. Arguably, §30 is another means for all acupuncturists (not merely those who practice in a corporate setting) to demonstrate financial responsibility; an acupuncturist who is incapable of paying, or refuses to pay, child support or taxes is less likely to satisfy potential liabilities owed to patients. Concededly, the "fit" between the state's interest in ensuring the financial accountability of acupuncturists and the means that it has adopted is imperfect. However, when a fundamental right is not at stake, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical, Inc.*, 848 U.S. 483, 487-88, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

In addition, there is a second rational reason for requiring that an applicant, such as Plaintiff, be current in child

support and tax obligations as a condition of licensure: A state may require good moral character as a qualification for entry into a profession, when the practitioners of the profession come into close contact with patients or clients. *See Schware*, 353 U.S. at 239, 77 S.Ct. 752 ("A State can require high standard of qualification, such as good moral character . . . , before it admits an applicant to the bar."). As one court has observed, in the context of the legal profession, the "[f]ailure to honor legal commitments and obligations is a proper ground for refusing to issue a certificate as to possession of the requisite character and moral fitness." *In re Beasley*, 243 Ga. 134, 252 S.E.2d 615, 617 (1979); *see also People v. Cully*, 286 Ill.App.3d 155, 221 Ill.Dec. 593, 675 N.E.2d 1017, 1024 (1997) (statning, in *dictum*, that, "[i]f the licensee culpably does not repay [his student] loan, this calls his moral character into question and could constitute conduct that defrauds or harms the public"). Admittedly, there is no express moral character component to the licensing of acupuncturists in the State of California. *Compare* Cal. Bus. & Prof. Code §6060 (providing that an applicant to the California State bar must possess "good moral character") *with* Cal. Bus. & Prof. Code §4938 (providing no moral character requirement for acupuncturists). However, the legislature need not have made the requirement of good moral character statutorily explicit outside of §30 itself. We recognize that, as a general matter, California law provides that a "license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits." Cal. Bus. & Prof. Code §475(c). That statute is not controlling, however, because §30 is a later, more specific statute addressing behavior that the California legislature deemed unworthy of acupuncturists. *See Hellon & Assocs. v. Phoenix*

Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992) (stating that, if two statutes conflict, the "later and more specific statute usually controls the earlier and more general one"). As noted, it is sufficient that the legislature rationally could have believed that moral character is related to an individual's fitness and capacity to practice acupuncture. Through the enactment of §30, the state imposed an implicit moral-character requirement for acupuncturists, as well as all licensees covered by that statute.

In summary, we conclude that, consistent with *Schware*, §30's disclosure requirement is rationally related to Plaintiff's fitness or capacity to practice acupuncture. The wisdom of that requirement is not for us to judge. For in the end, "it is for the legislature, not the courts, to balance the advantages and disadvantages of . . . new requirement[s]." *Williamson*, 348 U.S. at 487, 75 S.Ct. 461. Defendant Nielsen need not issue to Plaintiff an acpuncture license unless he first discloses his social security number.

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 25 2000
CLERK

No. 99-1457

In The

Supreme Court of the United States

ROY RICHARD DITTMAN,

Petitioner,

v.

STATE OF CALIFORNIA AND CONSUMER AFFAIRS AGENCY, MEDICAL BOARD OF CALIFORNIA, ACUPUNCTURE COMMITTEE, and MARILYN NIELSEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether section 7(a) of the Privacy Act of 1974 is enforceable in federal court? And if so, does California Business and Professions Code section 30, which requires disclosure of one's social security number as a condition of renewing a professional license, violate the Act?

2. Whether requiring an applicant for a professional license to disclose his social security number as a condition of renewing a professional license violates the applicant's due process rights.

3. If California Business and Professions Code section 30 is determined to violate the Privacy Act or petitioner's due process rights, is petitioner entitled to equitable relief and/or damages?

PARTIES TO PROCEEDINGS

The parties to the Court of Appeals proceeding are the following:

Petitioner: ROY RICHARD DITTMAN

Respondents: STATE OF CALIFORNIA STATE AND CONSUMER AFFAIRS AGENCY, MEDICAL BOARD OF CALIFORNIA, ACUPUNCTURE COMMITTEE, and MARILYN NIELSEN

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TABLE OF CONTENTS

Page

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

A. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH THIS COURT'S AUTHORITY 2

1. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH *SCHWARE V. BOARD OF BAR EXAMINERS OF NEW MEXICO* 2

2. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH *MAINE V. THIBOUTOT* 4

B. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH OTHER FEDERAL COURTS' RULINGS ON THE PRIVACY ACT .. 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Brookens v. *United States*, 627 F.2d 494 (D.C. Cir. 1980) 9

Chambers v. *Klein*, 419 F.Supp. 569 (D.C.N.J. 1978) 7

Doe v. *Sharp*, 491 F.Supp. 346 (D.Mass. 1980) 7

Doyle v. *Wilson*, 529 F.Supp. 1343 (D.Delaware 1982) 7

Greater Cleveland Welfare Rights Org. v. *Bauer*, 462 F.Supp. 1313 (N.D. Ohio 1978) 7

Green v. *Philbrook*, 576 F.2d 440 (2nd Cir. 1978) 7

Greidinger v. *Davis*, 988 F.2d 1344 (4th Cir. 1993) 7

Maine v. *Thiboutot*, 448 U.S. 1 (1980) 4, 5

McElrath v. *Califano*, 615 F.2d 434 (7th Cir. 1980) 7

Schware v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) 2, 3, 4

St. Michael's Convalescent v. *State of Calif.*, 643 F.2d 1369 (9th Cir. 1981) 6

Wolman v. *United States of America, Selective Service System*, 501 F.Supp. 310 (1980) 8

Yeager v. *Hackensack Water Co.*, 615 F.Supp. 1087 (D.C.N.J. 1985) 7

STATUTES

5 U.S.C. section 551(1) 6

5 U.S.C. section 552(a) 8

5 U.S.C. section 552(a)(10) 6

TABLE OF AUTHORITIES – Continued

Page

5 U.S.C. section 552a(g)(d) 6

5 U.S.C. section 552(e) 6

5 U.S.C. section 552(f) 6

42 U.S.C. section 602(A)(7) 4

42 U.S.C. section 1983 ..... 1, 4, 5

Business and Professions Code section 30 ..... 1, 3, 4

Business and Professions Code section 30(c) 3

Business and Professions Code section 30(j) 3

Military Selective Service Act 8

Privacy Act of 1974 section 7(a)(1) 1

Privacy Act section 7(a)(2) 9

Social Security Act 4, 5

BRIEF IN OPPOSITION TO PETITION TO WRIT OF CERTIORARI

Respondent respectfully files this brief in opposition to the Petition For Writ Of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Petitioner was a licensed acupuncturist in the State of California from 1983 to 1995. In 1995 his application to renew his license was rejected by respondents for failure to provide his social security number (SSN) on his application as required by California Business and Professions Code section 30. On September 21, 1995, petitioner was notified by the Acupuncture Committee of the California Medical Board that failure to provide his social security number would result in denial of a license. Petitioner refused to provide the State of California his social security number and on October 31, 1995, his license expired.

On October 30, 1997, petitioner filed an action pursuant to 42 U.S.C. section 1983, alleging that respondents' refusal to renew his license violated the due process clause of the Fourteenth Amendment and that requiring disclosure of his social security number as a condition to licensure violated 7(a)(1) of the Privacy Act. On June 23, 1998, the district court granted summary judgment in respondents' favor.

Petitioner filed a timely appeal to the Ninth Circuit Court of Appeals. On September 14, 1999, the Ninth Circuit affirmed the ruling of the District Court.

REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH THIS COURT'S AUTHORITY

1. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH *SCHWARE V. BOARD OF BAR EXAMINERS OF NEW MEXICO*

Petitioner contends that the appellate court's decision is in direct contradiction to this Court's ruling in *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). However, *Schware* is inapplicable here because in that case this Court addressed the issue of denying a professional license based on the applicant's *qualifications*. In the instant case, petitioner was denied a license for refusing to provide *identifying information*.

In *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), Schware had applied to take the New Mexico bar examination but was denied the opportunity based on moral character grounds. Specifically, Schware had disclosed that he had used certain aliases between 1933 and 1937 and that he had been arrested on several occasions prior to 1940. (*Id.* at 234.) Additionally, the Board had received confidential information that Schware had once been a member of the Communist Party. (*Id.* at 235.) Schware requested a hearing on the matter. At the hearing Schware called his wife, his rabbi, a local attorney, and the secretary to the dean of the law school to testify about his character. Schware took the stand himself and was subjected to thorough examination by the Board. He also introduced letters he had written his wife from 1944 through 1946 while on active duty in the Army

and letters from all but one member of his law school graduating class regarding his moral character. The Board presented no evidence. (*Id.* at 235-6.) According to the Court, nothing in the record of the hearing suggested that Schware had engaged in any conduct which reflected adversely on his character. (*Id.* at 236.)

The Court found that denying Schware the opportunity to take the bar examination violated his due process rights, explaining that "[a] state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any *qualification* must have a rational connection with the applicant's fitness or capacity to practice law." (Emphasis added.) (*Id.* at 239.) The court further explained that "[o]bviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." (Ibid.)

Schware is inapposite. In the instant case, petitioner was not denied the opportunity to pursue a profession based on his failure to meet a *qualification*, but on his refusal to provide identifying information – his social security number. Business and Professions Code section 30 prohibits any licensing board from processing any application for an original or renewed license unless the applicant provides its federal employer identification number or social security number. (Business and Professions Code § 30(c).) Although section 30(j) states that the Legislature intended to use the number to establish the

identification of persons affected by tax laws and for purposes of compliance with child support laws, it does not state that any applicant will be denied a license because he has not complied with either of these laws.

In sum, California Business and Professions Code section 30 provides for the denial of a professional license for failure to provide identifying information, not for failure to meet a qualification. Consequently, the criteria set forth in *Schware* is simply inapplicable in this case.

2. THE COURT OF APPEAL'S DECISION IS NOT INCONSISTENT WITH *MAINE V. THIBOUTOT*

In support of his contention that the Privacy Act is enforceable against the State, petitioner cites *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), and argues that the Court of Appeal's decision is inconsistent with it.

Respondent incorporates by reference the Court of Appeal's decision regarding enforceability of the Privacy Act against the State. With regard to petitioner's reliance on *Maine*, that case presents a different issue than that presented in the instant case.

In *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), the Thiboutots brought suit pursuant to 42 U.S.C. section 1983 against the State of Maine and its Commissioner of Human Services alleging a violation of the federal Social Security Act (42 U.S.C. § 602(A)(7).) The Thiboutots were married and had eight children, three of whom were Mr. Thiboutot's from a previous marriage. When the Department of Human Services computed their AFDC benefits, the Thiboutots were not given an allowance for the five

children which were exclusively Mr. Thiboutot's, notwithstanding that he was legally obligated to support them. (*Id.* at 3.) The Thiboutots brought suit pursuant to section 1983 challenging the State's interpretation of the Social Security Act. (*Id.* at 3.) The issue before the court was whether section 1983 encompasses claims based on purely statutory violations of federal law. (*Id.* at 2.) The court referred to the language of section 1983, which creates liability for every person who, acting under color of State authority, causes the deprivation of "any rights, privileges, or immunities *secured by the Constitution and laws* . . . " The question addressed by the court was whether the phrase "and laws," as used in section 1983, should be limited to some subset of laws. (*Id.* at 4.) The State had argued that the phrase "and laws" should be read as limited to civil rights or equal protection laws. (*Id.* at 6.) The court determined that "the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." (*Id.* at 4.)

The instant case presents a different issue than that presented in *Maine*. Here, the State is not arguing that petitioner cannot sue for a violation of the Privacy Act via section 1983 because section 1983 applies only to some limited subset of laws. Rather, petitioner's action is barred because the Privacy Act simply does not provide a "right . . . secured by the Constitution or laws" . . . against any state – only against federal agencies. As explained by the appellate court below, Congress has expressly limited private enforcement of the Privacy Act

to actions against agencies of the United States Government.[1]

No such action lies against state or local agencies. In other words, because enforcement of the Privacy Act is expressly limited to federal agencies, section 1983 cannot be used to circumvent the intent of Congress by providing for enforcement against State agencies.

B. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH OTHER FEDERAL COURTS' RULINGS ON THE PRIVACY ACT.

Petitioner contends that the Ninth Circuit decision that the Privacy Act cannot be enforced against the State conflicts with decisions of other circuits.

In support of his argument petitioner lists eight cases which address alleged Privacy Act violations by state agencies. However, none of those cases hold that the Act is enforceable against state agencies and thus none of

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[1] Section 5 U.S.C. section 552a(g)(D) creates a right of action for an individual to sue an agency. Section 552(a)(10) provides that "[f]or purposes of this section – (1) the term 'agency' means agency as defined in section 552(e) of this title." Section 552(e) refers to agency as defined in section 551(1) of the same title. (See 5 U.S.C. § 552(f).) Section 551(1) lists the various federal agencies to which it applies. (See *St. Michael's Convalescent* v. *State of Calif.*, 643 F.2d 1369 (9th Cir. 1981) (holding that under § 551(1), "agency does not encompass state agencies or bodies."). Thus, the provision creating a right of action for the Privacy Act refers only to the right to sue federal agencies, and not state agencies.

them creates a split in the circuits. Respondent incorporates by reference the Court of Appeal's decision regarding enforceability of the Act against states.

Petitioner cites *Green* v. *Philbrook*, 576 F.2d 440 (2nd Cir. 1978); *Chambers* v. *Klein*, 419 F.Supp. 569 (D.C.N.J. 1978); *Greater Cleveland Welfare Rights Org.* v. *Bauer*, 462 F.Supp. 1313 (N.D. Ohio 1978); *McElrath* v. *Califano*, 615 F.2d 434 (7th Cir. 1980); *Doe* v. *Sharp*, 491 F.Supp. 346 (D.Mass. 1980); *Doyle* v. *Wilson*, 529 F.Supp. 1343 (D.Delware 1982); *Yeager* v. *Hackensack Water Co.*, 615 F.Supp. 1087; (D.C.N.J. 1985); and *Greidinger* v. *Davis*, 988 F.2d 1344 (4th Cir. 1993). Of the eight cases, five simply do not discuss the issue of whether the Privacy Act provides a private right of action against states. (See *Green, Chambers, McElrath, Greidinger*, and *Doe*.) One, *Doyle*, acknowledged that "at least one Court has questioned whether section 7 can support a private right of action for retrospective relief," but did not reach the "thorny issue" because it found that "damages against [the defendants] were barred by the doctrine of official immunity." (*Doyle* v. *Wilson* 529 F.Supp. 1343, 1350 (1982).) The remaining two cases, *Greater Cleveland Welfare Rights* and *Yeager*, are district court cases which hold that the Privacy Act provides a private right of action, but they do not address the issue of whether the Act provides a right of action against *state* agencies. Thus, petitioner has failed to cite one case which holds that the Privacy Act provides a private right of action against state agencies.

Furthermore, *Greater Cleveland Welfare Rights* and *Yeager*, the only two cases cited by petitioner which even address the issue of whether the Privacy Act provides a private right of action at all, are district court cases

which, of course, cannot create a split of authority among the circuits.

Petitioner also relies on *Wolman* v. *United States of America, Selective Service System*, 501 F.Supp. 310 (1980), a case out of the District Court for the District of Columbia. First, Wolman was *vacated* July 8, 1982. Further, *Wolman* was a case brought against the federal Selective Service in which the plaintiffs alleged that the Selective Service's requirement that registrants supply their social security numbers violated the Privacy Act. One exception to the Privacy Act exists where obtaining social security numbers is directed by statute (5 U.S.C. § 552(a) (note) (1976)). The law reinstituting registration for the draft did not, at that time, contain a provision which authorized the Selective Service to obtain SSN's. Consequently, the court found that the Selective Service's practice of requiring each registrant to disclose a SSN violated the Privacy Act. Subsequently, the Military Selective Service Act was amended to provide the necessary statutory authority to require submission of SSN's by draft registrants. The Selective Service had apparently appealed the district court's ruling and the Court of Appeal remanded the case to the district court for further consideration in light of the statutory amendment. On remand, the district court granted the Selective Service's motion to dismiss because there was no longer any basis for holding that its regulation requiring registrants to submit SSN's was in violation of the Privacy Act. (*Wolman* v. *United States of America, Selective Service System*, 542 F.Supp. 84 (1982).)

Wolman is of no consequence here because (1) it was vacated, (2) it did not involve a state defendant, and, of course, there was no issue whether the Privacy Act could

be enforced against the State, and (3) it was a district court case and thus could not create a split in the circuits.

Petitioner refers to *Brookens* v. *United States*, 627 F.2d 494 (D.C. Cir. 1980). In that case, the plaintiff, a federal employee, sued the federal State Department for denying his travel advances based on his refusal to provide his SSN. Plaintiff alleged that the requirement violated the Privacy Act. The government contended, based on subparagraph (a)(2) of section 7 of the Act, that the Privacy Act was not violated because the Act does not apply to an agency maintaining a system of records existing before January 1, 1975. The government filed a 12(b)(6) motion with an affidavit stating that they had such a system of records. The motion was considered as a motion for summary judgment and was granted by the district court. The appellate court upheld the dismissal.

Brookens does not support petitioner's argument because it did not involve a state defendant. Neither the district court nor the appellate court addressed whether the Privacy Act can be enforced against the State.

CONCLUSION

Because petitioner has failed to demonstrate why this Court should grant certiorari, his petition should be denied.

Respectfully Submitted,

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